MEMORANDUM

FROM: Uniform Commercial Code Committee of the Business Law Section of the State Bar of California (the "Committee")

DATE: May 4, 2008

RE: Changes to UCC Article 9 Individual Debtor Name Provisions

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The debtor's name is the key to the Article 9 filing system, as financing statements are indexed by debtor's name and prospective secured parties and others search by debtor's name.[1] However, the degree of certainty that exists with respect to the name of a debtor that is a registered organization does not exist with respect to the name of a debtor who is an individual. While this issue has existed since the initial enactment of Article 9, concern about the issue appears to have grown recently and has provoked three states to enact non-uniform "solutions."

The Committee has begun its analysis of the problem generally and has analyzed in detail non-uniform amendments to Section 9-503 or 9-506 of Article 9 of the Uniform Commercial Code ("UCC" or the "Code")[2] enacted in Texas, Tennessee and Nebraska as they relate to the perfection of security interests against individual debtors, and, more specifically, as to whether such amendments appropriately address the issue of determining the name of an individual debtor for UCC filing purposes. ***In keeping with the Guiding Principles set forth below, the Committee believes that such individual state non-uniform amendments are undesirable and that the issues arising from individual debtor name filings should be fully analyzed by the Code's sponsor organizations (the ALI and NCCUSL, collectively referred to herein as the "sponsor organizations"). We believe that the well-established public participatory process carried out by the sponsor organizations is the method most likely to reach a carefully crafted and well-articulated solution that is consistent with Article 9 policies and that will enjoy support so widespread as to make likely a uniform and simultaneous nationwide adoption. We note that the sponsor organizations have created a Review Committee to consider and make a recommendation concerning whether there are problems under existing Article 9 that can and should now be dealt with by legislative amendment and, if so, to identify them. It is expected that the Review Committee will report its findings to the respective Executive Committees of the sponsor organizations within the next two months. It is also expected that the sponsor organizations will act promptly to appoint a Drafting Committee, if it is determined that amendments should be developed.***

This memorandum is a work-in-progress and may well be supplemented or revised to reflect the Committee's continuing research and analysis of the subject. This memorandum reaches definite conclusions concerning the non-uniform amendments enacted by the three states. Although the memorandum does not, at this stage, present a recommended definitive solution to the issues raised by filings against individual debtors, we have, in the Conclusions segment, presented some tentative

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[1] See, generally, Harry C. Sigman, *Twenty Questions about Filing under Revised Article 9: The Rules of the Game under New Part 5*, 74 Chi-Kent L. Rev. 861 (1999).

[2] Unless the context indicates otherwise, all references to "Article 9" are to the uniform version of Article 9 of the Uniform Commercial Code promulgated by The American Law Institute ("ALI") and The National Conference of Commissioners on Uniform State Laws ("NCCUSL") in 1999. Unless the context indicates otherwise, all "section" references are to sections of Article 9.

suggestions. We believe that our research and analysis has reached a point where this memorandum can contribute usefully to analysis and public discussion of the problems.

Please note that the positions set forth in this memorandum are those of the Committee only. They have not been adopted by the Business Law Section or its overall membership, or by the State Bar's Board of Governors or its overall membership and are not to be construed as the position of the State Bar of California. Membership on the Committee and in the Business Law Section is voluntary and funding for their activities, including all legislative activities, is obtained entirely from voluntary sources.

A. Guiding Principles and Criteria Generally Applicable to Analysis of Proposed Amendments to the UCC

The analysis of any proposed amendments to the UCC should be guided by the overarching principles (the "Guiding Principles") of: (A) preserving the uniformity of the UCC, and (B) maintaining the coherence of the UCC and consistency with the underlying purposes and policies of the UCC. Consequently, proposed amendments to the UCC should be analyzed based on the following specific criteria to determine whether the proposed amendments are (1) necessary, (2) appropriate, (3) comprehensive, and (4) uniform.

The first of these criteria, necessity, requires that there be a defect in the current text of the UCC that causes a problem in practice that can be solved by a change in the text. For example, where text has been subject to conflicting interpretations that have generated significant legal disputes or legitimate uncertainty causing significant cost or distortion of transactions, or have led to a result that is contrary to the underlying polices or purposes of the UCC, a change may be necessary. Attempts to "improve" on or "tinker" with the language of the UCC ("we can say it better"), where no serious need for a change has been demonstrated, or where there is no clear evidence that a real, rather than an imagined, problem exists under the current UCC text, should be resisted; attempts to make such changes raise the risk of unintended consequences and needlessly imperil uniformity due to the possibility that they will not be universally adopted. Even when it is arguable that the UCC might be improved by a particular amendment, an amendment is generally not advisable if the UCC, in its current form, will achieve the correct result. Changes should not be made to address problems that are the result not of a defect in the current text but of a mistake on the part of a person that failed to comply with the current text, unless the evidence suggests that a significant number of similar mistakes are being made, or are likely to be made, that can be attributed to ambiguous or confusing text.

The second criterion, appropriateness, requires that the amendment be directly targeted at correcting the problematic provisions in the UCC text. This requires precise identification of the problem and extensive and careful analysis of all of the options available to address the defect in the UCC text, and selection of the best solution among these options. The proposed correction for the defect should be complete and not incremental, and the costs, benefits, and burdens of the proposed change to all parties affected should be identified and taken into account. Furthermore, the language of the proposed amendment should be carefully tailored to address the identified defect and avoid unintended collateral effects. Finally, the proposed amendment should be in harmony with and fully integrated within the current UCC text.

The third criterion is comprehensiveness. As it is not feasible to engage in frequent legislative efforts on a nationwide level and frequent change may well result in instability, proposed amendments should, absent emergency, be gathered into a single comprehensive legislative package rather than being

introduced individually or in small bundles. Thus, it must always be considered whether a particular amendment, even if meritorious, can be combined with other proposed amendments in a comprehensive legislative package to be presented simultaneously to all states. A comprehensive approach to UCC amendments makes it more likely that such amendments will be fully integrated with each other and with the remainder of the UCC text and will be consistent with the purposes and policies underlying the UCC. Only in exceptional cases, when evidence of serious and imminent actual or potential harm creates an urgent need for immediate action, should the need for a particular amendment outweigh the importance of acting with due deliberation to propose a comprehensive package of amendments.

A comprehensive package of proposed amendments is more likely to draw the attention, study and input of a far wider constituency, enhancing both the likelihood of quality and the greater likelihood of acceptance, i.e., simultaneous and uniform enactment, producing satisfaction of the fourth criterion, uniformity. A lack of uniformity among the versions of the UCC adopted by the various states leads to increased transaction costs, the potential for costly errors and unintended consequences. Although uniformity can never be guaranteed, a proposed UCC amendment not aimed at solving a unique local problem should not be enacted by a state unless there is evidence that it enjoys sufficient widespread support to make likely nationwide enactment. An endeavor to seek approval of a particular amendment on an ad-hoc state-by-state basis, without a substantial organizational effort on a national level, would be ill-advised and would likely jeopardize the essential uniformity of the UCC.

The best possible text of the proposed amendments, meeting the foregoing criteria and having the best chance of nationwide uniform enactment, is most likely to be achieved through a vetting of the proposed amendments by the co-sponsors of the UCC--the National Conference of Commissioners on Uniform State Laws and the American Law Institute—supported by the American Bar Association and state bar UCC committees around the country.

B. Summary of Conclusions and Recommendations

In keeping with the Guiding Principles, the Committee believes that individual state non-uniform amendments to Section 9-503 or 9-506 are undesirable and that the issues arising from individual debtor name filings should be fully analyzed, and solutions determined, by the sponsor organizations in the well-established process, resulting in carefully crafted solutions that are consistent with Article 9 policies and supported nationwide so as to make likely a uniform and simultaneous adoption. While there may be solutions that alleviate the problem of individual debtor names, including the possibility of a statutory designation that, for filing purposes, enables the identification of a unique name for each individual debtor, uncoordinated and non-uniform legislative proposals (even if developed after limited consultations with selected individuals in the field) are less likely to produce better results than a comprehensive and uniform amendment resulting from a deliberative and public process carried out by the sponsor organizations. There is insufficient evidence that the individual debtor name issue, while important, is of such urgency as to require states to act now in an uncoordinated and non-uniform manner. It does not appear that the Texas, Tennessee and Nebraska state actions are the result of unique local circumstances or an urgent need, and thus, such actions are contrary to the goal of preserving the fundamental uniformity of the UCC. Furthermore, the legislative actions to date are inconsistent with the policy of Article 9 to place the burden on the filer to provide the correct debtor's

name.[3] These amendments differ from each other; generally, they do not provide relief for, and in many cases will significantly increase the burden on, searchers. Furthermore, the legislative amendments are not well-drafted. There is no demonstrated need to amend Sections 9-503 or 9-506 in a piecemeal fashion, rather than permitting such issues to be dealt with as part of a comprehensive UCC revision project.

C. Analysis of the "Necessity" for Amendments to Sections 9-503 or 9-506

The filing system is the heart of UCC Article 9. A financing statement must contain the debtor's name to be sufficient.[4] Section 9-503 provides specific rules for determining the debtor's name for various types of debtors that are not individuals. However, in the case of an individual debtor, the statute speaks only of providing "the individual . . . name of the debtor."[5] That term is not defined or otherwise elaborated on in the statute.

Section 9-506(c) provides that a financing statement that fails to sufficiently provide the debtor's name is not thereby rendered seriously misleading "[i]f a search of the records of the filing office under the debtor's correct name, using the filing office's standard search logic, if any, would disclose a financing statement that fails sufficiently to provide the name of the debtor in accordance with Section 9-503(a)."[6]

Under Section 9-503(a)(1), a debtor that is a registered organization debtor has, for "sufficiency" purposes, a single and unique debtor name - the one indicated on the public record of that debtor's jurisdiction of organization which shows the debtor to have been organized. There is no analogous source of single and unique individual debtor names that can be referred to for "sufficiency" purposes.

Whether a filed financing statement sufficiently provides the name of an individual debtor requires a two-step analysis:

1. Does the UCC financing statement provide the individual debtor's name?

2. If it does not, would a search of the filing office's records under the debtor's correct name, using the filing office's standard search logic, if any, disclose the financing statement?

The lack of certainty in the meaning of "individual . . . name of the debtor" in Section 9-503(a)(4), or the "debtor's correct name" under Section 9-506(c), is not created by Article 9 but rather stems from the absence generally of a nationally accepted definitive legal characterization of the concept. This lack of certainty has led to some anxiety concerning the filing rules. For example, the use of the term "correct" in Section 9-506 might be thought to raise an inference that there is only one correct individual debtor name; this inference, however, is only a possible, but not a necessary, inference. Several courts have

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[3] The rules reflect a balance between the competing interests of filers and searchers. The wider the latitude given to filers, the heavier the burden imposed on searchers. There are, of course, far more searches made than filings. It is noted, however, that in the limited category of purchase money non-inventory financing, it can be argued that having a cost-effective mechanism to assure perfection is more important than being able to confirm priority. While many of the reported decisions discussed in this memorandum relate to disputes between a secured party and a bankruptcy trustee, some involve disputes between competing creditors. The reported cases constitute a small and possibly unrepresentative sample of the actual disputes that have arisen over the years. This point is discussed further at text preceding footnote 39.

[4] UCC § 9-502.

[5] UCC § 9-503(a)(4)(A).

[6] UCC § 9-506(c) (emphasis added).

stated that the debtor's name for Article 9 filing purposes is the debtor's "legal" name.[7] These courts, however, did not define the concept of a "legal" name, and the text of Article 9 does not refer to a "legal" name.[8]

There does not appear to be an accepted national agreement, at least not a statutory one, on what a "legal name" is or how it can be ascertained. The common law generally recognizes the right of a person lawfully and effectively to change his or her name at will and assume a new name, so long as it is not done for a fraudulent or illegal purpose, without judicial involvement (although it is likely that a judicial procedure is an available alternative in every state). In a case that illustrates how an individual may use a variety of names without fraudulent intent, the name "Charles Chester Callaway" was given to the bankrupt by his parents shortly after his birth.[9] The Court described how the bankrupt used a variety of names:

> To distinguish him from an uncle, Charles W. Callaway, who lived in the same household, he was called "Chester." During his entire life he has been known in the community where he was born and has lived, by his family, friends, neighbors, and apparently by his creditors as well, as Chester, Chester C., Chet, or C. C. Callaway. On written documents he generally signed as "Chester Callaway" or "Chester C. Callaway." Only upon his induction into the army and in signing his petition in bankruptcy did he use the name "Charles Chester Callaway". His uncle, who still lives near by [sic], is known as Charles or Charles W. Callaway. All creditors in the bankruptcy proceeding referred to the bankrupt as "Chester Callaway" or "Chester C. Callaway."[10]

The Court then explained why any or even all of these names might be "legal":

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[7] See, e.g., *In re Berry*, 2006 WL 2795507 (Bankr.D.Kan. 2006); opinion supplemented by *In re Berry*, 2006 WL 3499682 (Bankr.D.Kan. Dec 01, 2006) (official UCC search conducted by the bankruptcy trustee on the Kansas Secretary of State's online system under "Michael R. Berry" yielded no reference to secured party's financing statement; held, financing statement referring to "Mike Berry" is "seriously misleading"); *In re Borden*, 353 B.R. 886 (D. Neb. 2006)(in adversary proceeding to determine priority dispute between an earlier-perfected secured party with blanket lien filed under the name "Michael Ray Borden" and purchase-money lien filed under the name of "Mike Borden," the use of the name "Mike Borden" rendered the purchase-money financing statement "seriously misleading" and therefore ineffective to perfect); and *In re Jones*, 2006 WL 3590097 (Bankr.D.Kan.2006)(bankruptcy trustee's official UCC search for liens against debtor who filed bankruptcy petition in the name of Christopher Gary Jones, using the "standard search logic" of the Kansas Secretary of State's office, did not reveal creditor's financing statement filed under name "Chris Jones;" financing statement held "seriously misleading.")

[8] At least one court mentioned that this conclusion finds support in the National Uniform Financing Statement Form. The instructions in the financing statement form set forth in UCC Section 9-521 state that the preparer should provide the "DEBTOR'S EXACT FULL LEGAL NAME." However, this does not, and should not be read as purporting to, modify the statutory language of Section 9-503, which requires only the debtor's "name." To begin with, the form is not obligatory; filers are not obliged to use that form (the purpose of the form is to provide a national safe harbor form, assuring filers that that form will not be rejected by any filing office in the country on the grounds of form). Further, the instruction, in redundant terms, was simply intended to stress the importance of providing the debtor's name accurately, to encourage the preparer to use diligence to determine it, and care in providing it, avoiding nicknames and mistakes. Had the drafters intended to require the debtor's "exact full legal name" as a condition to the sufficiency of the filing, they would have so stated explicitly in Section 9-503, and not hidden it in an instruction in the non-mandatory form provided in section 9-521, a form targeted at filing offices rather than filers. Nor does the reference in Section 9-506 to a debtor's "correct" name in any way modify the meaning of "name" in section 9-503. The word "correct" is used in Section 9-506(c) because that section deals with a financing statement that provides the name erroneously, obliging the safe harbor to be phrased in terms of disclosure by a search under the "correct" name.

[9] *Hauser v. Callaway*, 36 F.2d 667 (8th Cir. 1929)

[10] *Id.* at 669

> In the absence of any restrictive statute, it is the common-law right of a person to change his name, or he may by general usage or habit acquire a name notwithstanding it differs from the one given him in infancy. *(Citations omitted)*. A man's name for all practical and legal purposes is the name by which he is known and called in the community where he lives and is best known. To use the language of the Pennsylvania Court, 'A man's name is the designation by which he is distinctively known in the community.' *(Citations omitted)*. He may be as well known by one name as by another, and in such case the use of either is for most purposes sufficient. *(Citations omitted)*.[11]

Academic writing also recognizes that an individual may have more than one legal name:

> At common law, an individual's legal name is "the designation of a person recognized by the law as correct and sufficient and constituting ... one given name followed by the family name and in modern times requiring or permitting one or more middle given names or initials in abbreviation thereof . . . ." *(Citations omitted)*. Even the "legal" definition of legal name theoretically may permit an individual to have more than one legal name. See *625 Ill. Comp. Stat. 5/1-137.5* (2005) (defining legal name as the "full given name and surname of an individual as recorded at birth, recorded at marriage, or deemed as the correct legal name for use in reporting income by the Social Security Administration"). In addition, it is not entirely clear in some states whether a married woman is considered to have legally assumed her husband's name or whether a divorced woman may resume her birth name without court proceedings . . . .[12]

To further complicate matters, at least one court considering the issue of the sufficiency of the individual debtor's name for UCC filing purposes abandoned any analysis of the debtor's "correct" name, and instead relied on the competing secured party's "actual" knowledge of the debtor's nickname in ruling that the use of the nickname in the UCC financing statement was not seriously misleading because the competing secured party was not in fact misled.[13]

Prominent among the issues in determining an individual debtor's name is the use of nicknames. Characterization of an appellation as a nickname is a determination that it is not the debtor's actual name but instead a short, colloquial, informal or familiar substitute for the debtor's actual name. It is certainly possible, however, that given the common law understanding of what is a legal name in the U.S., a nickname could become the debtor's name, but in such case it would no longer be a nickname.[14] In a regime that permits a person to have only one name at a time, a nickname should not be

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[11] *Id.* at 669-670.

[12] Margit Livingston, *A Rose by Any Other Name Would Smell as Sweet (or Would It?) *: Filing and Searching in Article 9's Public Records*, 2007 B.Y.U.L. Rev. 111 (2007).

[13] See, *People's Bank v. Bryan Brothers Cattle Co*, 504 F.3d 549 (5th Cir. 2007) (holding that secured party knew debtor's nickname and therefore was not seriously misled by the financing statement filed by a competing creditor under the debtor's nickname). The briefs submitted by the parties in this case indicated that the searching creditor had over 200 papers in its file indicating the name under which the competing financing statement was filed. The Court emphasized that it was the creditor's *actual knowledge* of the name that made the use of that name on the prior financing statement "not seriously misleading."

[14] Due to the predominance in the reported individual debtor name cases of the nickname issue, it was debated by the Committee members whether to propose an amendment to Article 9 adding a provision explicitly declaring nicknames insufficient, similar to the "trade name" provision in Section 9-503(c) (which expressly states that a financing statement that provides only the debtor's trade name does not sufficiently provide the name of the debtor). However, in light of the reality that a nickname can be used with such frequency and consistency that it ceases to be a nickname and instead becomes the debtor's name under common law, the proposal appears unlikely to be helpful. Consequently, this idea was dropped from consideration.

considered the debtor's name if the debtor does not abandon the debtor's formal name by clearly and consistently replacing the formal name with the nickname, with the intent to abandon that formal name; in a regime that accepts that a person may have more than one name at the same time, a nickname should be considered the debtor's name if the debtor uses it clearly and consistently, even if not exclusively, with the intent to adopt it as an additional name. If an individual uses various names at different times for different uses, the common law should not treat such sporadic and limited uses as constituting a change of name, giving rise to a new debtor name, since there would not under these circumstances appear to be the requisite intent to abandon the former formal name and replace it with a new formal name (however informal that new name might itself appear).[15] This discussion, admittedly a rough articulation of a difficult concept, illustrates the high degree of fact-sensitivity of the name determination under common law and the ultimate difficulty of statutorily defining a person's name, at least for general purposes.

Since July 1, 2001, when revised Article 9 became effective, eleven reported cases have dealt with individual debtor name questions. Of these cases, two dealt with a spelling error in the debtor's name,[16] two addressed difficulties arising out of non-U.S. cultural naming conventions,[17] one involved a filing that was held insufficient for failure to include the debtor's middle name,[18] and six involved filings

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[15] Likewise, if an individual uses "Jr." only on rare occasions when it is necessary to distinguish the individual from a parent, and does not otherwise use the suffix, the requisite abandonment intent might be present, with the consequence that the suffix "Jr." would no longer be considered to be part of the individual's name.

[16] *Pankratz Implement Company v. Citizens National Bank*, 130 P.3d 57 (Ks. 2006) (filing provided debtor's first name as "Roger" instead of "Rodger" – filing statement held insufficient due to incorrect name); and *Hopkins v. NMTC Inc. (In re Fuell),* 2007 Bankr. LEXIS 4261 (filing under name of Andrew Fuel instead of Andrew R. Fuell – financing statement held insufficient due to incorrect name). [Note: the *Fuell* court did not discuss, or even note, the lack of the middle initial.]

[17] *All Bus. Corp. v. Choi*, 634 S.E.2d 400 (Ga. 2006) (filing under name "Gu, Sang Woo" instead of "Sang Woo Gu") and *Corona Fruits & Veggies, Inc. v. Frozsun Foods Inc.*, 142 Cal.App.4th 319 (2006) (filing under name "Armando Munoz" instead of "Armando Munoz Juarez.") In Corona Fruits, the court rejected an argument that the "debtor's name" should be determined based on Hispanic cultural naming conventions, stating, "The "naming convention" is legally irrelevant for UCC-1 purposes and, if accepted, would seriously undermine the concept of lien perfection."

Indeed, differing cultural norms present substantial problems in the presentation of individual debtor names. Any proposal for an amendment to the UCC should consider the ramifications of ethnic naming conventions on a nationwide basis as many regions have large populations of immigrants and in these regions non-Anglo naming conventions become relevant. For example, in China and other Asian, and even Easter European, countries, the sequence would generally be family name, given name. A Korean name consists of a family name followed by a given name (e.g., Ban Ki Moon, the U.N. Secretary General). In Spanish-speaking countries, an individual usually has two surnames (the surnames of each of the individual's parents); the father's surname usually precedes the mother's. For example, José Vasconcelos Calderón is *Señor Vasconcelos* ("Mr. Vasconcelos" in English), not *Señor Calderón*, and "Vasconcelos" is not his middle name. In the Arabic system, an individual would be addressed as a chain of names that trace back to the individual's family history. Moreover, Arabic names can be transliterated into the Roman alphabet in a number of different ways. For example, "Said al-Ghamdi" can be properly spelled "Saeed Al Ghamdi" or "Sayeed Alghamdi," depending on the method of transliteration employed. Until 2004, most people in Mongolia were identified strictly on a first name basis. Russian surnames generally differ depending on the individual's gender. Although these naming conventions may not arise frequently as immigrants generally adopt American naming conventions, these are issues that should be considered when relying on a system that demands an individual's correct name. One way to lessen confusion might be to require, for financing statement purposes, the debtor's "family name" rather than "last name." Given the diverse make-up of the US population today, any rule regarding individual debtor's names must provide filers and searchers alike with a way to identify a name that can form the basis for an alphabetical index suitable for searching.

[18] *Morris v. Snap On Credit, L.L.C (In re Stewart)*, 2006 Bankr. LEXIS 3014 (2006) (filing under name "Richard Stewart" instead of including debtor's middle name and filing under Richard Morgan Stewart IV) (Note: The standard search logic used by the Kansas Secretary of State's office disregards suffixes. It also treats middle names by equating middle initials with all names beginning with those initials and treats the absence of a middle name or initial as all middle names or initials. KAN ADMIN REG, 6016022(b)(8)(2003)).

using an individual's nickname.[19] This survey suggests that the ***predominant issue with respect to individual debtors' names is filer carelessness rather than legal uncertainty, and that the single most common problem was the use of a debtor's nickname.***[20]

Two of the six cases involving whether a nickname was seriously misleading were decided based on the court's determination that the secured party had actual prior knowledge of the debtor's "nickname." [21] The secured creditor's actual or constructive knowledge of alternate names used by a debtor should be irrelevant when a court determines whether the creditor used "the individual debtor's name" under Article 9." Four of the cases involving the sufficiency of a nickname held that such filings were "seriously misleading" because a search in the debtor's "legal" name would not reveal the "nickname" filings.[22]

More importantly, the case survey reveals that the predominant cause of individual debtor name problems, at least as disclosed by the reported cases (including the nickname cases), is filer carelessness, not a defect in the statutory rules or their expression.[23] In fact, of these eleven cases, from the limited facts provided in the cases, it is not clear that any of the cases would have been decided differently had

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[19] *In re Erwin*, 50 U.C.C.Rep. Serv. 2d 933 (Bankr.D.Kan. 2003) (filing under 'Mike Erwin' as the debtor's name was held not ineffective even though debtor's full name was 'Michael A. Erwin') [holding rejected by subsequent Kansas cases, discussed below]; *In re Kinderknecht*, 53 U.C.C. Rep. Serv. 2d 167 (B.A.P. 10th Cir. 2004) (financing statements under 'Terry J. Kinderknecht' instead of 'Terrance Joseph Kinderknecht' were held insufficient under Revised § 9-503(a)); *In re Borden*, 353 B.R. 886 (D. Neb. 2006) (filing under "Mike Borden," instead of "Michael Borden" held insufficient); *In re Berry*, 2006 WL 2795507 (Bankr.D.Kan. 2006)(filing under "Mike Berry" instead of "Michael R. Berry, Jr.") Opinion supplemented by *In re Berry*, 2006 WL 3499682 (Bankr.D.Kan. Dec 01, 2006) [rejecting In re Erwin, 50 U.C.C. Rep. Serv. 2d 933 (Bankr. D. Kan. 2003)], *In re Jones*, 2006 WL 3590097 (Bankr.D.Kan.2006)(filing under "Chris Jones" instead of "Christopher Gary Jones" held insufficient); compare with: *People's Bank v. Bryan Brothers Cattle Co*. 504 F.3d 549 (5th Cir. 2007) (filing under "Louie Dickerson" instead of "Brooks L. Dickerson" held sufficient).

[20] It is noteworthy that these cases do not openly consider the possibility that what was initially a nickname may have become the debtor's name. (See discussion in text following note 13, supra.)

[21] *In re Erwin, supra,* n. 19, was decided by a bankruptcy court, predicting how a Kansas court would rule on the issue. Subsequently, the Kansas Supreme Court rejected the reasoning and the result. *People's Bank, supra*. n. 13, found that the financing statement was not seriously misleading, relying on pre-revision cases. The Court explained, "Peoples was put on inquiry notice that a security interest in the property of 'Brooks L. Dickerson' could be listed under the name 'Louie Dickerson'." Dickerson held himself out to the community as Louie Dickerson, and he used this name in bank accounts, bills of sale, and with others with whom he did business. This is important because evaluating whether a filing is seriously misleading requires a court to examine the facts in a particular case, although the focus should be 'on whether potential creditors would have been misled as a result of the name the debtor was listed by' in the financing statement" [Citations omitted]. *Id*. at 559. The Committee believes that the court's analysis is faulty in several respects. Article 9's rules are not based on the notion of "inquiry notice," or, for that matter, even knowledge of an individual debtor's alternate name or nickname. Moreover, knowledge of a particular subsequent secured party of the use by a debtor of a nickname, without more, should not be relevant to the question whether the nickname made the financing statement seriously misleading (under the definitional approach that a nickname is not the debtor's name) and also should not be determinative of (although possibly might be relevant to) the question whether the debtor's use of the nickname has been of such a consistent and continuous nature and with the requisite abandonment intent as to convert that nickname into the "individual . . . name of the debtor" as referred to in Section 9-503(a)(4).

[22] See footnote 19*, supra*: *In re Kinderknecht,* 53 U.C.C. Rep. Serv. 2d 167 (B.A.P. 10th Cir. 2004); *In re Borden*, 353 B.R. 886 (D. Neb. 2006); *In re Berry*, 2006 WL 2795507 (Bankr.D.Kan. 2006); and *In re Jones*, 2006 WL 3590097 (Bankr.D.Kan.2006).

[23] For example, in *Corona Fruits & Veggies, Inc. v. Frozsun Foods Inc.*, *supra* n. 17, the secured creditor had a photo identification and "green card" identification showing that the debtor's name as "Armando Munoz Juarez;" nevertheless, the financing statement was filed under the name "Armando Munoz." Elodia Corona, appellants' account manager, prepared the UCC financing statements and testified: "I don't know why I didn't put his [i.e., debtor's] last name [on the UCC-1 financing statement]. I could have made a mistake . . . ." Ms. Corona was asked: "So the last name on all the Agreements is Juarez, but on the U.C.C. 1 Forms, you filed them as Munoz?" Ms. Corona answered, "Yes." *Id*. at 8. [Note that this testimony, while an unhelpful admission, does not address the argument that Munoz, the patronymic surname was, thus, the correct "last name" rather than the metronymic Juarez.]

the non-uniform rules enacted in Texas and Tennessee been in effect.[24] These cases suggest that rather than a better individual debtor name statute, what is needed are more careful filers. As for the Nebraska statute, it would have created a different result in a number of cases by protecting the filer vis-à-vis a subsequent searcher, but, as discussed below, only at a great cost to searchers, and often with a result that would be unfair and intuitively incorrect.

In light of the uncertainty in determining an individual debtor's correct name for UCC filing purposes, this Committee believes that the "necessity" criterion is satisfied at least to the extent of supporting the sponsor organizations' review of the individual debtor name provisions of Sections 9-503 and 9-506. However, cause for study by the sponsor organizations does not equate with cause for urgent action, or even necessarily for any action at all. The existence of a problem does not necessarily mean that there exists a solution the benefits of which outweigh its costs.

As discussed in Part A above, a demonstrated need for urgent action is required before uncoordinated and non-uniform individual state action with respect to any UCC amendments is justified. The preferability of more definitive rules for determining an individual debtor's name for filing purposes does not, in and of itself, warrant states to act independently and impair the uniformity created by the UCC, particularly in light of the relative dearth of cases (eleven) that have arisen with respect to the issue of individual debtor names during the last almost seven years since the effective date of Revised Article 9.

One source that has been asserted as demonstrating urgency (and thus purportedly justifying immediate independent state action)[25] is the "*The UCC Filing Flash*" newsletter.[26] The Committee has reviewed three of *The UCC Filing Flash* newsletter reports (the "Report(s)") mentioned as evidence of an urgent need to clarify the correct individual debtor name under Section 9-503. The Committee's review of the Reports indicates that the Reports fail to demonstrate that an urgent need exists to address the individual debtor name issue via independent state action.

The first Report, dated May 2006,[27] states that "At least 4,000,000 of the 20,000,000 active UCC financing statements contain seriously misleading debtor names under Revised Article 9" and "At least 10-15% of new financing statements being filed today are ineffective because the debtor name is seriously misleading." However, the Report then provides significant detail about errors in filings against *registered organization names* and *trust names* in Florida. Other than a very brief mention of multiple individual debtor names in section 7 of the Report, there is no substantive discussion of a significant problem with respect to individual debtor names.

The second Report, dated August 2006,[28] surveys debtor name filings in Vermont. It reviews 53,530 Vermont financing statements containing 40,618 different individual debtor names, filed from July 1, 2001 to June 2006. The Report finds issues with respect to the first names of individual debtors in about

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[24] See footnote 41 and accompanying text.

[25] Per e-mail dated March 20, 2008 (9:31 a.m.) from Susan E. Collins to the America Bar Association's ("ABA") Filing Office and Search Logic ("FOOSL") subcommittee: "[The] debtor name issues pose a current and potentially substantial risk to secured parties, as has been admittedly known to but unaddressed by the NCCUSL group for the last 50 years. R9 has now made these issues critical to secured parties, as evidenced by Carl Ernst's factual studies of these issues in 2 specific states."

[26] *The Uniform Commercial Code Filing Guide, UCC Revised Article 9 Alert*; published Carl R. Ernst, Publisher and Executive Editor, Kathryn L. Teal, Esq., Editor

[27] *UCC Revised Article 9 Alert*; *supra,* n. 27, Issue 06-1; May 2006 (Special Report).

[28] *UCC Revised Article 9 Alert*; *supra,* n. 27, Issue 06-2; August 2006 (Special Report).

7,000 (13%) of the filings against individual debtors, but concludes that most debtor name inconsistencies arise from the filer presumably using debtor nicknames (4,949 filings or 9% of the total filings, or almost 70% of the presumptive misleading individual debtor name filings). The Report notes (as discussed in the text above) that names that are common nicknames can be the actual name (and not a nickname) of the individual.[29] A much smaller percentage of the presumptive misleading individual debtor name filings in Vermont (1,302 or 2.4% of the total) were due to "uncommon" first names (defined in the Report as names used by less than 10% of the population according to U.S. Census Bureau statistics). The presumption that the uncommon names are in error would appear to point to filer error as well (i.e., filers are misspelling individual debtor names). Other individual debtor name errors cited in the Report are multiple last names (409 filings in total or less than 1%) and first initial only (177 filings in total). It would appear that only the "multiple last name" group of filings, less than 1% of the filings in Vermont, could be attributed to non-filer error (i.e., errors that could not be resolved with the proper exercise of due diligence and care by the filer). The Report concludes that 10-15% of individual debtor names are seriously misleading, and advocates that lenders exercise greater due diligence when filing. It appears that most of the incorrect individual debtor name filings cited in the Report are the result of filer error.

The third Report, dated June, 2007,[30] editorializes in favor of the then Texas legislative proposals, including the Texas bill on individual debtor names.

These Reports do not support the conclusion that there is a crisis in determining an individual debtor's correct name for searching and filing UCC financing statements. If anything, the studies establish that there may be widespread filer errors when filing against individual debtor names. It is difficult to conclude that the data cited in the Reports establish the existence of a crisis demanding immediate individual state solutions rather than the initiation of the national process of the sponsor organizations.

Such urgency is also not established by the fact that the absolute number of filings against individual debtors is greater than the number of filings against organizations. Although we have no data that establishes this as a fact, we suspect that the dollar volume of credit secured by Article 9 filings against organizations is significantly greater than that secured by filings against individual debtors.

Nevertheless, due to the increased concern about uncertainty as to an individual's "correct" name and the significant volume of filings against individual debtors,[31] it is the Committee's view that a study to determine the need for and feasibility of coordinated action to amend Article 9 to clarify the "correct" debtor name is justified; the sponsor organizations are already moving to deal with this matter. However, the Committee does not believe that the individual debtor name issue is of such urgency that it warrants hasty independent action by individual states outside of the established national UCC amendment review and deliberation process.

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[29] The Special Report states: "4,949 (9% of total) financing statements contain one of the 225 nicknames listed in Appendix 1. Of course, some of these names, such as Jack or Dan, may also be actual first names, but a secured party must take care to be certain that such a name is not a nickname." *Id.* at page 6.

[30] *UCC Revised Article 9 Alert*; *supra,* n. 27, Issue 07-2; June 2007(Special Issue – June 2007).

[31] The California Secretary of State estimates that approximately 30% of all filings in the State name individual debtors; in Texas, the Committee has been advised that such filings represent approximately 50% of the filings. We have also been informed anecdotally that more and more farmers are now using family trusts as their preferred mode of operation rather than doing business as individuals.

Texas was the first state to enact legislation amending the debtor's name provisions of its version of Article 9.[32] Nebraska recently amended Section 9-506 of its Article 9.[33] Fortunately, Nebraska subsequently deferred the effective date of that legislation until late next year to enable the Legislature to revisit the issue. Tennessee recently amended Section 9-503 of its Article 9.[34] These three state non-uniform UCC amendments are discussed in the following sections.

D. Texas Legislation

The Texas statute has added to its version of Section 9-503(a) the following provision, designated as subsection (4), and renumbered uniform subsection (4) as subsection (5):[35]

> (4)[A financing statement sufficiently provides the name of the debtor] if the debtor is an individual, if the financing statement provides the individual's name shown on the individual's driver's license or identification certificate issued by the individual's state of residence . . . .[36]
>
> (5) in other cases:
>
> (A) if the debtor has a name, only if the financing statement provides the individual or organizational name of the debtor . . . .

The first problem with the Texas statute is that it is unclear whether it is intended to make the name on a described driver's license[37] a safe harbor (sufficient by statutory fiat, but not necessarily the only sufficient name) or a statutory exclusive (the only one that would be sufficient) name for Article 9 filing purposes. The new Texas text lacks the word "only" found in every other subsection of 9-503(a), and subsection (5)(A) refers to an 'individual name.' This suggests that new subsection (4) was not intended to be exclusive and that only a safe harbor was intended. In that case, a filer might provide an individual debtors' name sufficiently either by providing the name on a described driver's license or by providing a name that would have been sufficient under a 'uniform' analysis. On the other hand, a Texas court might interpret subsection (5)(A) of the Texas statute ("other cases") as being applicable only when an individual debtor does not fall under subsection (4), e.g., does not have a driver's license issued by a state of residence, in which case, subsection (4) is not a safe harbor but is instead the determinant of the sole sufficient name in cases where an individual debtor has been issued a driver's license by a state of residence.

In addition, several subsidiary questions may be posed:

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[32] Tex. Bus. & Com. Code Ann. § 9.503(a).

[33] NE L 2007, LB 851, § 28. Enacted on March 28th, 2008.

[34] State of Tennessee Senate Bill 3732. Enacted on March 25, 2008; Tennessee Acts 2007, ch 648.

[35] Former paragraph (4) of the Texas statute has been re-designated as paragraph (5). The Texas statute has also made a change with respect to the name of a registered organization. Discussion of that portion of the statute is outside of the scope of this memorandum.

[36] Please see Exhibit A for a comparison of the Texas and uniform versions of UCC 9-503.

[37] Unless the context otherwise requires, references to driver's licenses in our discussion of the Texas statute should be understood to include identification certificates.

- Must the name provided on the financing statement be the full and exact replication of the name on the license or would either or both "Joseph Jones" or "Joseph A. Jones" be sufficient if the name on the license is "Joseph Alan Jones"?

- What if the debtor has more than one state of residence [compare Section 9-307(b)(1), which refers to an individual's "principal" residence] and either has or doesn't have a driver's license issued by Texas?

- As of what time is residence to be determined—when the license relied on was issued, when the financing statement is filed, or some other time?

- How is the Texas statute to be applied if a debtor has (even in the absence of fraudulent intent) licenses with different names issued by the same state at different times or by different states of residence (at the same or different times)?

- What is the effect of the Texas rule in a case where the debtor, after a filing in Texas in reliance on the Texas amendment, changes his or her location to a state that has the uniform text?

- What is the effect of the Texas statute in a case where the debtor becomes a resident of Texas after a filing was made in another state (while the debtor was resident there) that had the uniform text, if the name provided in that filing differed from the name on the debtor's driver's license (whether a Texas license or a license issued by the prior state)?

- Does the statute have any effect with respect to a filing made before the effective date of the enactment?

A text that provided responses to these questions would have been preferable. If a safe harbor was intended, that could have been more clearly indicated.[38]

If it is a safe harbor, the Texas amendment does nothing for searchers, who still must apply the 'uniform' analysis and search under any name that might be sufficient under the uniform text. If it is a statutory exclusive name, it still leaves searchers forced to make determinations as to whether and when the debtor might have fit within subsection (4), where and when the debtor might previously have resided and whether the debtor has now or at any time in the past had a driver's license with a name different from that on the license he or she is presenting to the searcher, information that is likely to be difficult and/or expensive to obtain without the cooperation of the debtor.

Proponents of the Texas amendment essentially argue that, whatever the flaws, the incremental benefit to filers outweighs all counter-considerations. It is hard to accept this, particularly if the statute is only a safe harbor, since that still leaves the filer, along with all other searchers, with the task of engaging in a 'uniform' analysis in order to conduct an effective search. At best, it frees the filer from making a few precautionary extra filings that a prudent filer in a uniform jurisdiction might choose to make, and the

[38] Perhaps this might have been achieved by placing an amendment in Section 9-506 of the Texas UCC rather than Section 9-503. Alternatively, this might have been achieved by, instead of changing Section 9-503(a) of the Texas UCC, inserting a new subsection at the end of Section 9-503 (or Section 9-503(a)) to the effect that, for purposes of Section 9-503(a)(4)(A), a financing statement that provides the individual's name exactly as shown on the individual's driver's license or identification certificate issued by the state of the individual's principal residence at the time of filing sufficiently provides the individual debtor's name, with an express indication that that source is not exclusively determinative of the debtor's name.

potential of having to file continuations with respect to those extra financing statements. Given the relatively low filing fees prevalent in the U.S. and a relatively small percentage of financing statements that are continued, is this burden so great? Further, are there really so many individual debtors who have more than three or four potential "names" [the most common variables being: (i) given name and surname; (ii) given name, middle initial and surname; and (iii) given name, middle name and surname]?[39]

If it is a safe harbor, the Texas amendment does not protect the filer against a prior filed financing statement under a different name that is also sufficient. Thus, in cases where priority, rather than merely perfection effective against the debtor's bankruptcy trustee, is of concern, the Texas amendment is insufficient. It is certainly true that some percentage of credit extended to individual debtors is non-inventory financing on a purchase money security interest ("PMSI") basis. Several of the cases cited above involve trustee avoidance actions, rather than priority disputes among competing secured parties. Since PMSI rights with respect to goods other than inventory and livestock require only timely perfection to enjoy priority over earlier filers, this particular class of secured parties would benefit from a safe harbor rule.[40]

Obviously, the Texas amendment does nothing with respect to the most common problem revealed by the cases—filer error. The Texas amendment should not help a filer that determined the debtor's name on a driver's license before misspelling it on the financing statement. The results of the cases surveyed in this memorandum would not likely be different had the Texas amendment been in effect.[41]

It should also be noted that the scope of the safe harbor provided by the Texas statute is, presumably unintentionally, limited to cases in which the debtor is an individual. It does not apply to filings when the debtor is a trust or a decedent's estate, filings that use the names of individuals in providing the debtor name. In cases where farmers are borrowing in the name of a family trust rather than as individuals, a legislative amendment like the one in Texas would not offer any additional protection to either filers or searchers of such a debtor.

Another concern raised by the Texas statute is its reliance on the integrity of driver's licenses or identifications cards as a source for the individual debtor name. Driver's licenses and identification

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[39] This question should be considered in light of the suggestion made in the Conclusions of this memorandum.

[40] Another situation where lenders may be less concerned about priority is when a lender is willing to extend credit to an individual secured by existing personal property and the transaction is too small to justify a priority search and the lender is willing to rely on the representations of the borrower. In that case, the lender may be satisfied with confirmation of perfection only.

[41] The Committee could not ascertain from the cases whether the parties involved used a driver's license to determine the debtor's name. It is possible that some of the nickname cases would have been decided differently under the Texas and Tennessee debtor name statutes. For example, if the driver's license, in the case of the Texas statute, or the other referenced documents, in the case of the Tennessee statute, reflected the debtor's nickname as the debtor's name on a listed acceptable document, then the filings would have been deemed effective (but would still not have assured priority if a prior filer had provided a different but also sufficient name). However, most of the cases fail to indicate what documents, if any, were relied on to determine the debtor's name. In several cases that did reference a source document, the filer simply incorrectly reflected on the financing statement the name shown on that document. No statute can excuse such filer error without creating a gross burden and injustice for searchers. This is the effect (along with producing absurd results in particular cases) of the Nebraska statute. In cases where the appellate court simply referred to the debtor's "legal" name as established at the trial court level, there was no explanation of how the trial court determined the "legal" name. And there were cases in which the court found that the erring party knew the debtor's "correct" name and for some unexplained reason failed to use it; that same filer error could occur if a driver's license was the basis for determining the debtor's "correct" name.

cards are notorious for their unreliability.[42] Significant opportunities exist for individuals to obtain multiple (at least sequentially and whether or not fraudulently) driver's license and identification cards.[43] A review of driver's license issuance requirements in a variety of states suggests that at present most states require (whether or not these requirements are diligently enforced) foundation documents. In California, the Department of Motor Vehicles verifies that the "foundation" document requirements for a driver's license, which requirements are almost identical to the requirements of the REAL ID Act, are also the same for the state-issued ID card, with the exception that an individual can use his or her driver's license as a foundation document for the state-issued ID card.[44]

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[42] National Conference of State Legislatures Report on Driver's License Integrity, http://www.ncsl.org/statefed/DLRCSG.htm (last visited March 8, 2008) states:

> "All states verify the identity of a potential license holder before issuing a driver's license. The documents used to verify identity for this purpose are known as "foundation documents" because they provide the building blocks of personal information on which the license is issued. Foundation documents range from birth certificates, to utility bills, to passports, to other states' driver's licenses. **The principal challenge related to foundation documents is states' ability to verify their authenticity and validity. States do not routinely verify, for instance, that the foundation documents with which they're presented are authentic (i.e. that the document is genuine) or valid (i.e. that the document is eligible to be used)**. For example, a deceased individual's birth certificate is authentic, but it is invalid for use as a foundation document for a driver's license . . . . Currently, few states actively verify foundation documents . . . .
>
> A second but related issue is the process by which a state ensures that the individual presenting valid foundation documents is indeed the individual to who those documents belong. It is possible, in other words, for Jane to present Sally's birth certificate and get a valid driver's license in Sally's name. The birth certificate itself is an authentic document but it does not belong to the person presenting it." (emphasis added)

[43] The National Conference of State Legislatures' Report on Driver's License Integrity states:

> Fraudulent issuance of driver's licenses comes in two forms – fraud that occurs without the cooperation of the licensing authority and fraud that occurs with it. It is clear that the current system provides an individual who chooses to produce fraudulent foundation documents with a significant opportunity to illegally hold a valid license or licenses.

As a result of the homeland security concerns raised by 9/11, many states have revised their laws in an effort to make driver's licenses harder to forge (through the use of holograms, bar codes, etc.) and harder to obtain. It is possible that some of the identified problems with respect to using driver's licenses may be eliminated when states comply with The Real ID Act. However, states have been able to obtain extensions of time to comply with the Act. At present, driver's licenses suffer from too many indicia of unreliability to provide an effective or practical solution to determining a unique actual debtor name.

[44] Compare: REAL ID Act: §202(c)(1), Minimum Drivers License/ID Issuance Standards:

At a minimum, a state shall require the presentation and verification of the following information:

1. A photo identity document (except that a non-photo identity document is acceptable if it includes both person's full legal name and date of birth)
2. Documentation showing the person's date of birth
3. Proof of the person's social security account number (SSN) or verification that the person is not eligible for an SSN
4. Documentation showing the person's name and address of principal residence

vs. California drivers license documentation requirements (See: http://www.dmv.ca.gov/dl/dl_info.htm#BDLP):

1. Complete application form DL 44.
2. Give a thumb print
3. Have your picture taken

Each state lists a variety of documents that are usable to establish the applicant's name and date of birth. However, not all states require photo identification. An individual could obtain a driver's license in another person's name and, conceivably, obtain multiple licenses in this fashion.[45] As a result of these realities, significant opportunities exist for individuals to obtain fraudulent driver's licenses and identity cards. Furthermore, a political issue being debated in several states is whether to issue driver's licenses to undocumented aliens. It remains to be seen whether this expansion will be enacted. On the other hand, with heightened security concerns in the U.S., and the potential for the Real ID Act to have some impact (even if that Act never takes full effect), it may well be that a driver's license will become much more reliable in a few years from now than it is today.

Not everyone has a driver's license or identification card. However, this does not appear to be a significant issue. According to the U.S. Department of Transportation, Federal Highway Administration, as of 2005, approximately 67% of the "Total Resident" population of the United States holds a driver's license.[46] However, of the segment of the population that does not hold a driver's license, a significant portion of the adults within that segment is likely to hold a state-issued identification certificate. Without the benefit of any empirical data, the Committee suspects that only a very small segment of the population seeking financing in an individual debtor name would not hold, or be able fairly readily to obtain, a state-issued driver's license or state-issued identification card.[47]

The Committee also considered the delay in transaction timing, or increase in transaction costs, entailed in obtaining a driver's license or identification card in those cases where a debtor does not already possess such identification. The Committee reviewed the process and requirements for obtaining a driver's license or ID card from the State of California[48] and found that the State of California issues a temporary driver's license or ID card upon application at the counter at any local office of the Department of Motor Vehicles, effective until the official photo ID is mailed by the DMV typically several weeks later. The temporary card does not have a photo. However, as the primary goal of the Texas solution is determining the correct individual debtor name for filing purposes, and not avoidance of fraud (which is a legitimate concern, but a separate consideration), the individual debtor name found on a temporary driver's license or state-issued ID card should be sufficient for filing purposes. In light of the ease in obtaining a driver's license or identification card, it does not appear to be a great burden to require that individual debtors obtain a driver's license or state-issued ID card as a pre-condition to the

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4. Provide your social security number. It will be verified with the Social Security Administration while you are in the office.
5. Verify your birth date and legal presence
6. Provide your true full name

[45] Indeed, an individual can obtain multiple drivers' licenses in different names, without having fraudulent or malicious intent Anecdotally, one of the Committee members had the experience of simultaneously holding two California drivers' licenses, each in a different name. She held a license in the name of "Edith Gail Resnick-Warkentine." (The DMV, without having been requested to do so by her, had originally hyphenated her maiden and married names when she married.) When she asked the DMV to correct the license to reflect her "true" last name, the helpful DMV employee changed the name to "Edith Gail Resnick Warkentine." She retained possession of the unexpired license with the "last" name of "Resnick-Warkentine" and received her new license with the "last" name of "Warkentine" almost two months before the first license expired.

[46] See: http://www.fhwa.dot.gov/policy/ohim/hs05/pdf/dl1c.pdf . (Last visited on April 20th, 2008). These numbers are even lower in Texas – 64% of the Total Population. It is unclear if "Total Population" as used in this report refers to all residents, the driving population, or adult population.

[47] This seems to be borne out by information in the press accounts of the recent U.S. Supreme Court "Indiana voter ID" case. See e.g., The Economist, p. 38 (May 3, 2008).

[48] See: http://www.dmv.ca.gov/dl/dl_info.htm#BDLP. (Last visited April 20th, 2008).

financing transaction. This would result in only a very modest delay in, or increased cost to, the transaction.

For the reasons stated above, the Texas non-uniform provision cannot serve as a model solution, even if one accepts the driver's license as a useful source for establishing the individual debtor's name

E. Tennessee Legislation

The Tennessee legislation[49] amends Section 47-9-503 of the Tennessee UCC to provide that a financing statement sufficiently provides the name of an individual debtor only if the financing statement provides the individual's name shown on one of the following items: (i) a driver's license or identification card issued in lieu of a driver's license, (ii) a birth certificate, (iii) a passport, (iv) a social security card or (v) a military identification card.[50]

This statute, although superficially similar to the Texas statute, differs from it in several important respects, but unfortunately also does not provide a useful model for other states to follow. It does not provide multiple "safe harbors." The "only if" language makes clear that the statute is intended to mandate five alternative sources (exclusive of any other source) for a sufficient name for Article 9 filing purposes, regardless of the name actually used by the debtor, the name by which the debtor is commonly known, the name which the debtor uses routinely to sign documents, and the debtor's "legal" name for any other purpose. There are surely many persons who have never used or been known by the full names exactly as shown on their birth certificates. Moreover, the effect will be that secured parties and their counsel exercising careful due diligence will be compelled to examine and take into account all five specified sources of identification. All searchers will be compelled to search against each name shown on each such form of identification (past or present).

The Tennessee amendment does not provide explicit guidance for the resolution of priority disputes among filers that used different sources; presumably it is intended that the "first to file" would prevail, as each such financing statement would be "sufficient." However, the poorly drafted section 3, which appears to be intended as a transition provision, might make this issue ambiguous in the context of pre- and post-effective date competing secured parties. The Tennessee statute will likely increase the extent of due diligence beyond that currently conducted by secured parties. This additional due diligence will increase overall costs for conducting secured financing transactions in Tennessee.

Furthermore, several of the listed sources raise potential questions. The driver's license is not in any way (e.g., by residence) limited to one or even a few issuing states. Is the passport intended to refer only to U.S. passports or also to those issued by other nations? If the birth certificate or the passport may be one issued by any nation, might there be special reliability concerns? With respect to the integrity of the driver's license issuance process, see the discussion in Section D of this memorandum regarding the Texas legislation.

The other source documentation identified in the Tennessee act also suffers from reliability issues. Birth certificates do not contain photos, nor do they reflect formal or informal legal name changes that may have occurred since birth. A U.S. passport may be obtained by presentation of a certified copy of a birth

[49] State of Tennessee Senate Bill 3732. Enacted on March 25, 2008; Tennessee Acts 2007, ch 648.

[50] Please see Exhibit B for a comparison of the Tennessee statute to the equivalent uniform version of UCC 9-503.

certificate and driver's license, making it no more reliable than a driver's license.[51] A social security card has no photo identification and also may not reflect name changes that may have occurred since the issuance of the social security card.

The Tennessee statute, like the Texas statute, fails to specify whether the name must be the name exactly as shown on the source document relied on. Arguably, if a driver's license identifies an individual as "John Ramsey Smith," a financing statement satisfies the statutory requirement if it provides the debtor's name as "John Smith" or as "John R. Smith" as each of these is "shown" on the driver's license.

Subparagraph (5) indicates that "in other cases" the name of "the individual" is sufficient, without referring back to Section 47-9-503(a)(4). Is this language consistent with the apparently intended exclusivity of the items listed in (4) as the possible source of the "debtor's name"?

Furthermore, the Tennessee act's "statement of intent" is troubling. The statement provides: "It is the legislative intent to create a broad safe harbor for the use of a debtor's name in any form permitted by this act." In fact, the statute is far more than a safe harbor. Shouldn't the statute be limited to the provision of a debtor's name on an initial financing statement, or an amendment of the debtor's name, only? Also, the references to "forms" and "filings" do not conform to the existing medium-neutral language used in Article 9. The statement of intent refers to financing statements that are "validly filed." This term is not used in Article 9. The confusing reference to a filing that was "validly filed" and "continues to be valid" should be clarified to explain how such a filing would be affected by the "safe harbors" created.

Finally, the statement of intent to the Tennessee statute provides that the statute shall have retroactive effect (although this retroactivity would not appear to offer any benefit to searchers because prior valid filings remain effective). Does this retroactivity raise a constitutional issue? Depending on the facts and on how it is interpreted, it might raise significant issues of fairness for earlier filers.

The Tennessee statute is both poorly thought-through and poorly drafted, highlighting the need for a thorough and more expert process of the sponsor organizations.

F. Nebraska Legislation

On March 13, 2008, the Nebraska Legislature passed LB 851.[52] It was signed into law by the Governor on March 19, 2008.[53] Fortunately, subsequent legislation postponed the effective date of this provision of LB 851 until late 2009, allowing an opportunity to revisit this non-uniform provision before it does any harm. If left to go into effect unchanged, this provision will have a significant impact on those who extend credit to (and presumably conduct UCC searches against) individual debtors in the State of Nebraska.

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[51] Specifically, to obtain a U.S. passport one must show proof of citizenship and proof of identity. Proof of citizenship is primarily shown through a previous passport or a certified copy of a birth certificate, but there are other options. Proof of identity may be shown through a previous U.S. passport (mutilated, altered, or damaged passports are not acceptable as proof of identity), Naturalization Certificate, or current valid Driver's license, Government ID: city, state or federal; or Military ID: military and dependents. http://www.travel.state.gov/passport/get/first/first_832.html (last visited March 9, 2008).

[52] State of Nebraska Legislative Bill 716, which was amended to become part of Legislative Bill 851.

[53] NE L 2007, LB 851, § 28. Enacted on March 28th, 2008.

The Nebraska legislation amends Section 9-506(c) of the Nebraska UCC to provide that a financing statement is sufficient if a search under just the correct last name of the individual would disclose the financing statement.[54] It appears that the intended effect of this legislation is that, regardless of the nature and extent of an error, first and middle names will have no impact on sufficiency of a financing statement.

The legislation can be read to make a financing statement sufficient in Nebraska so long as the debtor's last name is correct, regardless of errors of the type which courts have almost unanimously found to be seriously misleading. By its focus on last names only, the legislation ignores the possibilities of filings under a debtor's nickname, or filings where the surname is correct, but the first name is misspelled, or filings without middle names – all examples of errors that have been found seriously misleading because a financing statement was not found using a filing office's standard search logic. A filing that provides a completely wrong first name, so that the financing statement fails by any standard to reflect "the debtor's name," would be found to be not seriously misleading. This legislation would make all such erroneous financing statements effective. That result is completely contrary to the intended result under Article 9.[55] Ultimately, the Nebraska statute would have a significant effect on the results in most of the debtor name cases discussed above, but that statute would lead to the wrong results. This statute protects the careless filer at the cost of the diligent searcher, and would lead to what most would agree is the "incorrect" result. The UCC should not protect careless or incorrect filers.

As a consequence of this legislation, searchers will have to review *every financing statement that provides the same last name as the individual name searched*. This could be a monumental task. For example, a UCC search of the individual last name "Johnson" on the Nebraska Secretary of State's web site produces *2,671 unique active records*.[56] Each would have to be reviewed as part of a diligent search. The risk and due diligence burden on searchers will increase significantly in Nebraska.

By reducing the determination of the correct name of an individual debtor to an examination of the surname only, the Nebraska legislation completely reverses the balance between filers and searchers reflected in the policy of Article 9.[57]

The Nebraska statute highlights the need for a thorough and careful review process. The Nebraska statute significantly increases the burden on searchers, and the Committee hopes the statute will not be allowed to go into effect.

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[54] Please see Exhibit C for a comparison of the Nebraska statute to the equivalent uniform version of UCC 9-506.

[55] Consider, for example, the possible absurd result where Lender A lends to "William Smith" but files against "John Smith". Searcher B searches under the correct name, "William Smith," but he would lose to Lender A, as the improperly filed filing under "John Smith" would be found by just searching "Smith." This is an example of protecting the incompetent filer at the cost of the subsequent searcher, who now has to consider every financing statement disclosed by a search under "Smith," Moreover, the searcher has no way of knowing that the filing against "John Smith" is intended to be a filing against "William Smith." The address on a financing statement is a very unreliable filter. Debtors have multiple addresses (Article 9 does not require any particular address from among several possible addresses) and debtors change addresses frequently, so a different address from the one known to the searcher does not establish that the financing statement relates to a different debtor.

[56] This statistic is attributed to Paul Hodnefield, Associate General Counsel, *Corporation Service Company* in an e-mail dated March 18, 2008 (8:50 a.m.).

[57] This policy existed prior to revised Article 9, but was intended to be bolstered by revised Article 9. See, e.g., *In re Summit Staffing Polk County, Inc., 305 B.R. 347, 354 (Bankr. M.D. Fla. 2003): "R*evised Article 9 requires more accuracy in filings and places less burden on the searcher to seek out erroneous filings. The revisions to Article 9 remove some of the burden placed on searchers under the former law and do not require multiple searches using variations on the debtor's name."

G. Conclusions

None of the non-uniform legislation reviewed by the Committee in this Memo presents a satisfactory solution and none addresses the primary problem revealed by the case law – that most debtor name cases before the courts have been the result of filer error. They all fail to address additional issues related to determining and providing a debtor's name, such as cultural naming norms, non-U.S. alphabets, etc. They all fail to consider sufficiently the burden they would impose on searchers, and they all ignore the impact of lack of uniformity. They are all poorly-drafted. Further study of the debtor name issue and possible solutions should be conducted on a national basis before any other non-uniform state legislation is adopted. Enactment of piecemeal legislation may serve to delay or hinder development and enactment of better solutions.

We turn from the criticisms of and concerns about the non-uniform legislation to consider potential alternative solutions. We have not completed our analysis and this memorandum does not purport to present a "silver bullet" solution. We have, at least tentatively, concluded that if there is going to be a driver's license-based solution, it should be a statutorily mandated sole source for a sufficient individual debtor name, rather than a safe harbor. Well-drafted, and providing answers to the questions raised above concerning the Texas statute, such a solution would provide substantially greater certainty than exists presently. This would be even more likely to be the case if it were accompanied by another change—a mandatory formatting specifying that a debtor's name, for filing purposes, consists of a given name, a middle initial (if the individual has a middle name) and a surname. This would combine a single source with a single format and dramatically reduce the uncertainty. This combined solution has particular attraction because there are many instances when the name on the driver's license is not the name generally used by the debtor in his or her daily life or even in executing legal documents. This is particularly true with respect to middle names, which are very likely to appear on driver's licenses (and even more the case on passports and birth certificates[58]) while often not part of the name by which the debtor is commonly known. We note that the 1040 federal income tax form and the federal customs declaration form ask for (and provide space only for) a middle initial, not a full middle name.

In all events, adoption of a solution should take into account the possibility that it might not become effective simultaneously throughout the country and must be accompanied by appropriate transition provisions and solutions to any priority problems and conflicts problems that might arise, and should also be accompanied by enhanced instructions in electronic filing programs and on the reverse side of paper forms, as well as user-education programs. Only after dealing with all of the foregoing can a well-informed judgment be made as to whether the benefits gained from a given solution exceed the costs involved.

We intend to continue to study this and other possible solutions (e.g., the development of a unique identifier) and hope to contribute further to the debate.

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[58] Birth certificates , of course, will not reflect subsequent changes, e.g., marriage, divorce, and judicial and non-judicial changes. They seem more suitable to establish identity of the person (although they lack a photo) than identification of the person's name. On the other hand, they may well be among the least vulnerable to fraudulent alteration and, typically, can be verified from official records.

GENERAL NOTE: Please also note that if and when legislation with respect to any of the matters discussed in this Memo is introduced in California, our Committee is obliged to complete certain formal procedures required by the State Bar of California before the Committee can communicate its views on such legislation. If we then elect to do so, the Committee will evaluate such proposed legislation at that time and provide such comments on it as we deem appropriate after those procedures have been completed.

EXHIBIT A

UNIFORM COMMERCIAL CODE 9-503 COMPARED TO TEXAS BUSINESS AND COMMERCE 9.503

(a) A financing statement sufficiently provides the name of the debtor:

(1) If the debtor is a registered organization, only if the financing statement provides the name of the debtor indicated on the debtor's formation documents that are filed of public record inof the debtor's jurisdiction of organization to create the registered organization and that showwhich shows the debtor to have been organized, including any amendments to those documents for the express purpose of amending the debtor's name;

(2) If the debtor is a decedent's estate, only if the financing statement provides the name of the decedent and indicates that the debtor is an estate;

(3) If the debtor is a trust or a trustee acting with respect to property held in trust, only if the financing statement:

(A) Provides the name specified for the trust in its organic documents or, if no name is specified, provides the name of the settlor and additional information sufficient to distinguish the debtor from other trusts having one or more of the same settlers; and

(B) Indicates, in the debtor's name or otherwise, that the debtor is a trust or is a trustee acting with respect to property held in trust;

(4) If the debtor is an individual, if the financing statement provides the individual's name shown on the individual's driver's license or identification certificate issued by the individual's state of residence; and

(5) In other cases:

(A) If the debtor has a name, only if the financing statementit provides the individual or organizational name of the debtor; and

(B) If the debtor does not have a name, only if the financing statementit provides the names of the partners, members, associates, or other persons comprising the debtor.

(b) A financing statement that provides the name of the debtor in accordance with Subsection (a) is not rendered ineffective by the absence of:

(1) A trade name or other name of the debtor; or

(2) Unless required under Subsection (a) (4)(B), names of partners, members, associates, or other persons comprising the debtor.

(c) A financing statement that provides only the debtor's trade name does not sufficiently provide the name of the debtor.

(d) Failure to indicate the representative capacity of a secured party or representative of a secured party does not affect the sufficiency of a financing statement.

(e) A financing statement may provide the name of more than one debtor and the name of more than one secured party.

EXHIBIT B

UNIFORM COMMERCIAL CODE 9-503 COMPARED TO TENNESSEE SENATE BILL 3732

SENATE BILL 3732
By Bunch

AN ACT to amend Tennessee Code Annotated, Title 47, Chapter 9, Part 5, relative to secured transactions.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 47-9-503 is amended by deleting subsection (a) in its entirety and substituting instead the following:

(a) A financing statement sufficiently provides the name of the debtor:

(1) If the debtor is a registered organization, only if the financing statement provides the name of the debtor indicated on the debtor's formation documents that are filed of public record inof the debtor's jurisdiction of organization to create the registered organization and that showwhich shows the debtor to have been organized, including any amendments to those documents for the express purpose of amending the debtor's name:

(2) If the debtor is a decedent's estate, only if the financing statement provides the name of the decedent and indicates that the debtor is an estate.;

(3) If the debtor is a trust or a trustee acting with respect to property held in trust, only if the financing statement:

(A) It provides the name specified for the trust in its organic documents or, if no name is specified, provides the name of the settler and additional information sufficient to distinguish the debtor from other trusts having one (1) or more of the same settlers; and

(B) It indicates, in the debtor's name or otherwise, that the debtor is a trust or is a trustee acting with respect to property held in trust.;

(4) If the debtor is an individual, only if the financing statement provides the individual's name shown on one (1) of the following:

(A) A state-issued driver's license or identification card issued in lieu of a driver's license;

(B) A birth certificate;

(C) A passport:

(D) A social security card; or

(E) A government-issued military identification card; and

(5) In other cases:

(A) If the debtor has a name, only if it provides the individual or organizational name of the debtor; and

(B) If the debtor does not have a name, only if it provides the names of the partners, members, associates, or other persons comprising the debtor.

~~(b) A financing statement that provides the name of the debtor in accordance with subdivision (a) is not rendered ineffective by the absence of:~~

~~(1) A trade name or other name of the debtor.~~

~~(2) Unless required under subparagraph (B) of paragraph (4) of subdivision (a), names of partners, members, associates, or other persons comprising the debtor.~~

~~(c) A financing statement that provides only the debtor's trade name does not sufficiently provide the name of the debtor.~~

~~(d) Failure to indicate the representative capacity of a secured party or representative of a secured party does not affect the sufficiency of a financing statement.~~

~~(e) A financing statement may provide the name of more than one debtor and the name of more than one secured party.~~

SECTION 2. Tennessee Code Annotated, Section 47-9-516(b)(3), is amended by deleting subsection (D) in its entirety and substituting instead the following:

(D) In the case of a record filed or recorded in the filing office described in § 47-9-501(a)(1)~~-1~~, the record does not provide the name of the debtor and a sufficient description of the real property to which it relates;

SECTION 3. It is the legislative intent to create a broad safe harbor for the use of a debtor's name in any form permitted by this act. To this end, this act applies to any filings made both before and after May 1, 2008; provided, however, any filing made prior to May 1, 2008, that was validly filed but which does not conform to the requirements of this act shall continue to be valid and nevertheless benefit from the safe harbor created hereby and no amendment shall be required to conform to the requirements of this act.

SECTION 4. This act shall take effect May 1, 2008, the public welfare requiring it.

EXHIBIT C

UNIFORM COMMERCIAL CODE 9-506 COMPARED TO NEBRASKA LEGISLATIVE BILL 716

LEGISLATURE OF NEBRASKA
ONE HUNDREDTH LEGISLATURE
SECOND SESSION
LEGISLATIVE BILL 716

Introduced by Pahls, 31.
Read first time January 09, 2008
Committee: Banking, Commerce and Insurance

A BILL

FOR AN ACT relating to secured transactions; to amend section 2 9-506, Uniform Commercial Code, Reissue Revised Statutes 3 of Nebraska; to change provisions relating to the effect of errors and omissions in a financing statement; and to repeal the original section.

Be it enacted by the people of the State of Nebraska,

Section 1. Section 9-506, Uniform Commercial Code, Reissue Revised Statutes of Nebraska, is amended to read:

9-506 Effect of errors or omissions~~Substantial compliance with requirements~~.

(a) A financing statement substantially satisfying the requirements of this part is effective, even if it has minor errors or omissions, unless the errors or omissions make the financing statement seriously misleading.

(b) Except as otherwise provided in subsection (c), a financing statement that fails sufficiently to provide the name of the debtor in accordance with section 9-503(a) is seriously misleading.

(c) If a search of the records of the filing office under the debtor's correct name, or, in the case of a debtor who is an individual, the debtor's correct last name, using the filing office's standard search logic, if any, would disclose a financing statement that fails sufficiently to provide the name of the debtor in accordance with section 9-503(a), the name provided does not make the financing statement seriously misleading.

(d) For purposes of section 9-508(b), the "debtor's correct name" in subsection (c) means the correct name of the new debtor.

Sec. 2. Original section 9-506, Uniform Commercial Code, Reissue Revised Statutes of Nebraska, is repealed.